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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-742

JACK W. GRIGSBY,
Petitioner

v.

DEPARTMENT OF ENERGY, JAMES R. SCHLESINGER and THE UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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versus

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Jack W. Grigsby ("Grigsby") petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States.

Opinions Below

The opinion of the court of appeals on rehearing (App. B, pp. A-3 - A-19) is not yet reported. The original opinion of the court of Appeals (App. D, pp. A-21 - A-42) is not yet reported. The opinion of the district court (App. I, pp. A-50 - A-66) is not reported. Nor is there any official report of the decision of FEA on appeal (App. J, pp. A-67 - 87), nor the remedial order of the FEA[1] (App. K, pp. A-88 - A-114).

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1. The Federal Energy Administration (FEA) is now the Department of Energy (DOE). Both are sometimes herein referred to as "agency."

Jurisdiction

The judgment of the court of appeals was entered on October 5, 1978 (App. A, pp. A-1 - A-2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. § 754, incorporating Section 211(g) of the Economic Stabilization Act of 1970, as amended (12 U.S.C. § 1904, note).

Question Presented

Whether, in a case in which review of agency action was sought in a district court, and the district court affirmed on substantially the same grounds assigned by the agency, the court of appeals, after finding the district court's grounds clearly erroneous, may remand the case to the district court with instructions to decide the issue not on grounds articulated by the agency but on grounds first articulated in the *post hoc* argument of the agency's appellate counsel.

Statutes and Regulations Involved

At issue here is the interpretation and application of the "property definition" in the Regulations originally adopted by the Cost of Living Council which read as follows:

> "Property is the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 38 Fed. Reg. 22538 (August 22, 1973); 10 C.F.R. § 212.

This was adopted pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904, note. The

definition was re-adopted by the Federal Energy Administration ("FEA," now "DOE") pursuant to the Emergency Petroleum Allocation act of 1975, as amended, 15 U.S.C. § 751, et seq. (Since no question is raised as to the meaning or effect of the statutes they are not copied here.)

The property definition in the Regulations was amended, effective September 1, 1976, to read:

> " 'Property' means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation." 41 Fed. Reg. 36172, August 26, 1976; 10 C.F.R. § 212.72.

Statement

In 1968, Grigsby, as operator (acting for himself and for a number of non-operator working interest owners), drilled a producing oil well known as the Lucky Strike Well No. 1, said well being situated on the "Lucky Strike" leased premises. Louisiana Department of Conservation Order No. 464-F-1, effective January 22, 1969, created a unit around said well for production from the Heywood Sand Reservoir, said unit being designed as "Heywood RA SUB," and Grigsby being designated unit operator. (As held by the court of appeals on rehearing (App. B, p. A-14), this order did not

give Grigsby a "right to produce" from any other reservoir.) After producing for some time the well began to produce excessive quantities of salt water. It was anticipated by Grigsby that the well would shortly "water-out," but that a well drilled "up-structure" on another leased premises within the unit would be productive. (App. B, pp. A-5, A-6.)

Grigsby accordingly applied to the Department of Conservation, as required, for permission to drill a substitute unit well. Permission having been granted, Grigsby drilled the new well up-structure on the Robert Leger leased premises, located within the surface periphery of Heywood RA SUB. It was found that the Heywood Sand in the Robert Leger Well was non-productive, but that the well could be completed in a stratigraphically higher reservoir (later denominated the Upper Heywood "A" Sand, Reservoir A) which was wholly separated physically from the reservoir in which the Lucky Strike Well had been completed. The well was so completed and went on production on October 14, 1974. After obtaining production history on the new well, Grigsby applied to the Department of Conservation for units affecting the new reservoir, which resulted, after a hearing, in Order No. 464-K, effective June 15, 1976, in which the Robert Leger Well was named the unit well, and Grigsby the unit operator, for the Upper Heywood "A" RA SUB (translated, the "Upper Heywood 'A,' Reservoir A, Sand Unit B"). (This order did not give Grigsby the "right to produce" from any other reservoir.) The order contained an express finding that the Upper Heywood "A" Sand, Reservoir A, is a reservoir separate and distinct from the Heywood Sand, Reservoir A. (App. B, pp. A-6, A-7.)

Grigsby, believing that the new well, on different surface

leased premises, producing from a physically separate reservoir, permitted production therefrom to be treated as "new oil," sold the production from the well to willing purchasers at the prices permitted by (then) FEA price regulation to be charged for "new oil."

On November 29, 1976, without a hearing on a record (but after an informal conference) the FEA issued a remedial order to Grigsby for asserted violations of the price regulations; Grigsby was ordered to reduce the prices charged on production from the Robert Leger Well to "old oil" prices, and to make refunds for past "overcharges." (App. K, pp. A-88 - A-114.) On December 11, 1976, Grigsby filed an appeal from the remedial order with the FEA's Office of Exceptions and Appeals, which arm of the agency agreed with Grigsby's position as to production after September 1, 1976 (when the Regulations were amended) but upheld the refunds called for by the remedial order. (App. J, pp. A-67 - A-87.)

Grigsby sought review in the United States District Court. That court granted the agency's motion for summary judgment upholding the agency's orders, and, on the agency's counterclaim, ordering Grigsby to comply. (App. I, pp. A-50 A-56.) Grigsby appealed to the Temporary Emergency Court of Appeals of the United States ("TECA") which, on initial hearing, affirmed the district court. (App. D, pp. A-21 - A-42.) On rehearing, TECA reversed the district court on this issue, holding that summary judgment was rendered "prematurely and on clearly erroneous findings." The court of appeals remanded the case, but on stringent instructions as to the issue to be tried, the burden of proof, the evidence to be adduced, and the weight to be given it. (App. B, pp. A-16,

A-17.)

Grigsby is not aggrieved by the reversal; it is the remand order and its instructions to which this petition is addressed.

Reasons for Granting the Writ [2]

In this case, the court of appeals has ordered a partial remand to the district court with instructions to decide the case on grounds *not* articulated by the agency whose action is being reviewed. In so doing, the court of appeals inadvertently ordered the district court to violate the rule which this Court has been at pains to enforce, *viz*: that "an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . ." *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 169. See also *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196; *N.L.R.B. v. Metropolitan Life Insurance Company*, 381 U.S. 438, 443-4; *F.P.C. v. Texaco Inc.*, 417 U.S. 380, 397.

Additionally, the partial remand order restricts the decision of the district court to a determination of whether the production from the Robert Leger Well No. 1 was "apportioned among the lessees who shared in interest in the Heywood RA SUB," in which event the court is told to treat the production as "old oil." Nothing in the "property definition" nor in the agency's announced rulings, warrants the use of such a test. Thus, to this extent, the ruling of the court of appeals inadvertently interferes with the administration of

2. Grigsby neither acquiesces in, nor abandons his position in regard to, the ruling of the court of appeals as to the West Lake Pontchartrain property (App. B, p. A-19), but does not seek certiorari in regard thereto.

the Emergency Petroleum Allocation Act of 1975 and its implementing regulations.

Because Grigsby is an operator of crude oil producing properties, he is subject to the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760h (1977), as well as the DOE regulations promulgated thereunder. These regulations spell out the two-tier crude oil pricing system. The tier pricing system was established in August, 1973, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977). The implementing regulations were first promulgated by the Cost of Living Council, *see* 6 C.F.R. §§ 150.353 and 150.354 (1975), later adopted by the FEA, and are now enforced by the DOE. They provide that "old oil" not be sold above the lower tier ceiling price, 10 C.F.R. § 212.73 (1977), and that "new oil" not be sold above the upper tier ceiling price, 10 C.F.R. § 212.73 (1977). Because the upper tier ceiling price is based upon the highest posted price on September 30, 1975, and the lower tier ceiling price is based upon the highest posted price on May 15, 1973, the upper-tier price works to the advantage of the seller of crude oil.

Crude oil is treated as "new oil" to the extent that it exceeds the 1972 level of production of the *property* from which it was produced. The threshold inquiry in determining the amount of new oil produced from a premises is therefore whether the premises is a *property* that produced oil in 1972. This question can be answered only through applying the definition of the term "property." The regulations initially defined "property" as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 38 Fed.Reg. 22538 (August 22, 1973); 10 C.F.R. § 212.

Grigsby had drilled the Lucky Strike Well in 1968, and the Louisiana Department of Conservation had created a unit around said well limited to a defined reservoir or pool (the Heywood Sand). When this well was approaching depletion due to encroaching salt water, Grigsby, in 1974, applied to the Department of Conservation for permission to drill a substitute unit well, which permission was granted. However, the so-called substitute well-the Robert Leger Well-- found the Heywood Sand non-productive ("watered-out"), but discovered production in a separate reservoir immediately above the Heywood Sand, later defined as the Upper Heywood "A" Sand. *Grigsby produced from the Upper Heywood "A" Sand through the Robert Leger Well.*

At the time of the completion of the Robert Leger Well in 1974, there was no guidance for Grigsby as to the meaning of the "property" definition, which the court of appeals here conceded to suffer "from a severe case of unartful drafting" (App. D, p. A-31). Grigsby had drilled a new well on a different leased premises, to a physically separate reservoir and thought himself entitled to treat production from the Robert Leger Well as "new oil" and sold his production to a willing purchaser at "new oil" prices.

The agency, without a hearing on a record, issued its remedial order on November 29, 1976, ordering Grigsby to refund asserted overcharges. The remedial order ignored the existence of Louisiana Conservation Department Order No. 464-K which defined the Upper Heywood "A" Sand and established the unit around the Robert Leger Well. It wrongly assumed that the earlier Order No. 464-F-1 affecting the Heywood Sand-Lucky Strike Well applied to the reservoir from which the Robert Leger Well produced. (App. K,

pp. A-92 - A-94; A-102 - A-103.)

Grigsby appealed the remedial order to the agency's Office of Exceptions and Appeals, pointing out the errors made by the agency. The agency's decision on appeal issued December 14, 1976. It recognized that the effect of Conservation Department Order No. 464-K was to establish that the Robert Leger Well produced from a different "property," but only after September 1, 1976, when the FEA (now DOE) had amended its regulations concerning the "property" definition. (App. J, pp. A-18 - A-79.) However, the agency continued to treat the unit affecting the Lucky Strike Well as though it were coextensive in all dimensions with the unit affecting the Robert Leger Well as to production prior to the revision of the agency's regulations. (App. J, pp. A-73 - A-77.)

Grigsby sought review of the agency's action before the United States District Court for the Western District of Louisiana. The district court granted the agency's motion for summary judgment, finding no genuine issue of material fact, on the legal basis that, under Louisiana law, production from the Robert Leger Well was in accordance with the same right to produce as the production from the Lucky Strike Well. (App. I, pp. A-54 - 59.) This substantially affirmed the agency's decision on administrative appeal. (Also, it was a plainly demonstrable error of law.)

Grigsby then went to TECA. On initial hearing, the court of appeals followed the same line, upholding the district court and the agency on the same basis, but articulating positively that Order No. 464-F-1 affecting the Lucky Strike Well did not limit the unit thereby created "to a specific

reservoir" and that, for the purposes of the Emergency Petroleum Allocation Act, "the order therefore created one right to produce which covered all the reservoirs existing beneath the surface of the unit." (App. B, p. A-35.)

At this point, on petition for rehearing, it was possible for Grigsby to demonstrate beyond any doubt that the agency, the district court and the court of appeals had made clearly erroneous conclusions of law in determining that the unit for the Lucky Strike Well created the right to produce under which the Robert Leger Well was produced. It was plain, even under the agency's theory, that the Lucky Strike Well was produced under a right to produce accorded by Order No. 464-F-1 which was restricted to a specific reservoir, and that whatever might be "the right to produce" pursuant to which the Robert Leger Well was produced, it was not the same as the right under which the Lucky Strike Well produced. (App. B, pp. A-10 - A-14.)

When the court of appeals reached this conclusion, its duty was clear. The district court had granted a summary judgment improperly because, under Rule 56, F.R.C.P., the moving party was not "entitled to a judgment as a matter of law," and, to the extent that the district court had accepted the agency's factual representations, there remained genuine issues as to material facts. The court of appeals should have reversed the district court on its fundamental holding (*i.e.*, that the "right to produce" created by Order No. 464-F-1 was the same "right to produce" under which the Robert Leger Well was produced) as prayed for by Grigsby. Since this also destroyed the fundamental basis of the agency's action, the court of appeals should also have reversed and vacated the agency's remedial order, or at the least, remanded

the matter for further proceedings in the district court in the light of the opinion on appeal, without restrictive instructions.

The court of appeals conceded that "*in hindsight*[3] Grigsby was correct" in deciding that Robert Leger Well production was not produced under the same "right to produce" as production from the Lucky Strike Well (App. B, p. A-14.) The court also found that this conformed to FEA Ruling 1977-1, a portion of which the court quoted (*Id.*), and comported with Louisiana law (App. B, p. A-13). Also, the court of appeals found that it is "beyond dispute" that on June 24, 1976, the issuance of Order No. 464-K gave rise to a "new" right to produce and thus to a "new" property (*Id.*). However, the court then went on to create a "no man's land" of the period between first production in the Robert Leger Well (October 14, 1974) and the issuance of Order No. 464-K (June 24, 1976, effective June 15, 1976).[4] The court of appeals remanded the case to the district court "for consideration of the official status of the Robert Leger Well No. 1 production from October 14, 1974, until June 24, 1976." (App. B, p. A-16.) Grigsby is to bear "the burden of proving that the Robert Leger Well No. 1 production was not treated as production from the Heywood Sand, Reservoir A, for the period in question. *Id.* Grigsby is to have this burden so that "DOE may, in enforcing price control regulations, rely upon the treatment of production as well as the official designations made by state regulatory agencies." *Id.* The

3. The court does not explain why Grigsby is not entitled to "hindsight" equally with the agency. The agency's decisions were based on "hindsight" applications of agency interpretive rulings.

4. In fixing upon the date "June 24, 1976," the court of appeals inadvertently overlooked that Order No. 464-K on its face is made effective June 15, 1976.

court defined "treatment" as *not* including Grigsby's election to charge "new oil" prices,[5] but as referring to "whether or not the production was allocated according to a pooling agreement or order" (App. B, p. A-17, n. "p"). Finally, the court directed: "If the production from the Robert Leger Well No. 1 were apportioned among the lessees who shared an interest in the Heywood RA SUB, in accordance with the above pooling order, then the production should have been classified as old oil." *Id.*

Neither the agency nor the district court based any result on the grounds of such "treatment." Indeed, the insertion of this consideration as a ground of decision in interpreting the property definition appears to be wholly foreign to the agency's announced criteria [6] and to be nothing more than a substitution by the court of appeals of its expertise for that of the agency. The holding of the court of appeals appears to stem (App. B, p. A-36), not from agency decision, but from the *post hoc* argument of counsel[7] in the "Responsive Brief of the Government on Rehearing," *viz* (pp. 10-11):

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5. Yet the property definition as amended (see *supra*, p. 3) uses the word "treat" as equivalent to charging new oil prices.

6. FEA Ruling 1977-1 (42 Fed.Reg. 3628, 3634) quoted in the opinion on rehearing (App. B, p. A-14), expressly countenances treatment of production from the non-unitized portion of unitized premises as production from a separate property, which production might just as likely be allocated to the same working interest and royalty owners in the same proportions.

7. See *Burlington Truck Lines v. United States, supra,* 371 U.S. at p. 168; *N.L.R.B. v. Metropolitan Life Insurance Company, supra,* 381 U.S. at pp. 443-4.

> "Grigsby has always treated the Leger Well production as 'new' oil from a different property, despite the Conservation Commission's designation of the Leger Well as the unit well for the Heywood Sand, the continuation of the Heywood Sand unitization order, and Grigsby's payment of pro rata shares to the unit's parties in interest. In short, even while all parties involved were treating the production from the Robert Leger Well as production from the same Heywood Sand Unit, and, therefore, from the same property, Grigsby priced this production as though it were coming from a different property."

Since the issue of "treatment" did not become an issue either before the agency or before the district court, no evidentiary record on the subject was made by the agency or by Grigsby. But it is obvious by visual inspection of the record that the surface periphery of the Heywood RA SUB is coextensive with the surface periphery of the Upper Heywood "A" RA SUB so that, presumptively, proceeds of production from the Robert Leger Well would be apportioned among the same parties in the same proportions as proceeds of production from the Lucky Strike Well. Further, since it was obvious, given the coextensive character of the two sands separated by only 11 feet of intervening rock, that when the matter was presented to the Department of Conservation, the periphery of the boundary of the new unit would be the same as the old, it is not remarkable that the proceeds of production would continue to be divided in the same manner in the interim preceding the adoption of Order No. 464-K. In short, the court of appeals having been convinced"against [its] will" that the grounds assigned by the

agency and the district court were clearly erroneous, has effectually reached the same result, on grounds of its own choosing, by remand instructions imposing a burden on Grigsby ostensibly impossible of support.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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